84-1782

No.

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In the Supreme Court of the United States

October Term, 1984

SMYTHE, CRAMER COMPANY, L. B. McKELVEY, as President of Smythe, Cramer Company, BARBARA DAVIS, Individually and as Agent of Smythe, Cramer Company,

Petitioners,

vs.

DR. WILLIAM A. SMITH and MRS. BETTY SMITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is abuse of discretion for a trial court to award attorneys fees to a prevailing defendant pursuant to the Civil Rights Attorneys Fees Award Act of 1976 (42 U.S.C. §1988), at the conclusion of a fair housing action against a real estate company, where evidence introduced at trial indicated: (a) that Plaintiffs' claim that private mortgage insurance necessary to complete the financing on this transaction, was issued as a matter of course, was groundless and frivolous, as shown by Plaintiffs' misconduct in attempting to obtain such insurance; and, (b) that Sellers' decision to accept a secondary offer after Plaintiffs' failure to obtain financing was made after consulting an attorney, and not as the result of any statements by Defendants.

2. Can Plaintiffs, in an action for racial discrimination, join all parties involved in a real estate transaction, despite the fact that there is no evidence that some of the Defendants could have participated in the discrimination?

3. Can the Plaintiffs avoid the liability for tne legal expenses of the non-participating defendants who were forced to defend themselves regardless of not being involved in any racial discrimination whatsoever, but were only the normal parties involved in a real estate transaction?

4. Can Plaintiffs avoid liability under Section 42 U.S.C. §1988 when Plaintiffs carelessly included the real estate brokers who were subsequently found to be free of any racial discrimination and the Sellers conveyed the premises to Plaintiffs under a contract to refrain from being sued by Plaintiffs for racial discrimination?

5. Did the Appellate Court by failing to distinguish that the Defendant-Sellers of the property, by evidence

contained in the transcript, might have been guilty of racial prejudice, but there was no evidence in the transcript that the Defendant, Smythe, Cramer Company, was guilty; and was the failure to make this distinction between the plaintiff's act to the prejudice of the innocent party, viz., Defendant, Smythe, Cramer Co.?

6. Would not justice seem to require that when a judgment is rendered in the lower court based on findings of fact and conclusions of law, that a reversal of that judgment must also be based on the findings of fact and conclusions of law of the Appellate Court, as divulged by the record which contradicts the trial court?

PARTIES BELOW

Parties before the U.S. Court of Appeals for the Sixth Circuit were Dr. William A. Smith and Mrs. Betty Smith, as Appellants. Smythe, Cramer Company, L. B. McKelvey and Barbara Davis appeared as Appellees.

William T. Schuldt and Dorothy Schuldt did not appear as parties in the Court of Appeals. Pursuant to a Settlement Agreement entered into with Plaintiffs, Mr. & Mrs. Schuldt were dismissed from the case before the matter went to trial in U. S. District Court.

28.1 STATEMENT

Smythe, Cramer Company is an Ohio Corporation having no parent company, subsidiaries (except wholly owned) nor affiliates.

TABLE OF CONTENTS

Questions Presented for Review I
Parties Below III
28.1 Statement III
Opinions Below 1
Jurisdiction 2
Statutory Provision Involved 2
Statement of the Case 2
Reasons in Support of Petition 7

Appendix:

Decision of the United States Court of Appeals for the Sixth Circuit (February 6, 1985) A1
Oral Decision of the United States District Court (May 2, 1980) A14
Findings of Fact and Conclusions of Law of the United States District Court (February 25, 1981) A28
Post-Judgment Memorandum Opinion and Order of the United States District Court (June 1, 1983) A32
Judgment Entry of the United States Court of Appeals for the Sixth Circuit (Filed February 6, 1985) A39
42 U.S.C.S. §1988 ..... A40
Ohio Revised Code §4735.18 ..... A41

TABLE OF AUTHORITIES

Cases

Allen Calculators v. National Cash Register, 322 U.S. 137, 88 L. Ed. 1188, 64 S. Ct. 905, *reh. den.* 322 U.S. 771, 88 L. Ed. 1596, 64 S. Ct. 1257 (1944) 9-10

Brisbane v. Port Authority of New York, 550 F. Supp. 222 (S.D. New York 1982) 7

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) 8, 10, 11

Goff v. Texas Instruments, Inc., 429 F. Supp. 973 (N.D. Texas 1977) 11

Hughes v. Rowe, 449 U.S. 5 (1980) 10

Lacy v. General Electric Co., 558 F. Supp. 277 (E.D. Pa. 1982) 7

Smith v. Smythe, Cramer Co., 571 F. Supp. 58 (N.D. Ohio 1983) 1, 8

Smith v. Smythe, Cramer Co., 754 F.2d 180 (6th Cir. 1985) 1, 8, 9

Statutes

42 U.S.C. §1988 (1976) 2, 6, 7

O.R.C. §4735.18 (FF) 10

Miscellaneous

1976 *U.S. Cong. 2nd Admin. News* 5908 8

Heinz, Timothy J., *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard*, 8 UNIV. OF TOLEDO L. REV. 259 (Winter 1977) 12

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SMYTHE, CRAMER COMPANY, L. B. McKELVEY, as President of Smythe, Cramer Company, BARBARA DAVIS, Individually and as Agent of Smythe, Cramer Company,

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Respondents.

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To the United States Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The judgment of the Trial Court on the merits of the Complaint was made in open court on May 2, 1980. A transcript of said ruling is attached at Appendix p. A14. Findings of Fact and Conclusions of Law filed by the Trial Court are appended hereto at p. A28.

The decision of the District Court on the Motion for an Award of Attorneys Fees is reported at 571 F. Supp. 58 and is appended hereto at p. A32.

The decision of the Sixth Circuit Court of Appeals reversing the District Court is reported at 754 F.2d 180 and is appended hereto at p. A1.

JURISDICTION

The decision sought to be reviewed was made and entered on February 6, 1985.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 42 U.S.C. Section 1988, appended hereto at p. A40.

STATEMENT OF THE CASE

Respondents Dr. William Smith and Mrs. Betty Smith initiated an action under the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, *et seq.*, and under the Civil Rights Acts of 1870 and 1866, 42 U.S.C. §§1981 and 1982, in federal district court alleging that Defendants-Petitioners refused to sell a home to them because of their race.

Plaintiffs had entered into a Purchase Agreement with William J. and Dorothy Schuldt for a home located at 3600 Lytle Road, Shaker Heights, Ohio. The property was listed for sale by Smythe, Cramer Company, of which L. B. McKelvey is President and Barbara Davis, an agent. The Purchase Agreement entered into and between the Buyers and Sellers provided, *inter alia*, that financing for the property was to be obtained within fifteen (15) days. The financing period expired on December 17, 1979. The Smiths applied for financing for the Lytle Road property at First Bank National Association of Cleveland.

On December 17, 1979, Herman Knight, Vice President of Real Estate Loans at First Bank National Association, informed the Smythe, Cramer Company office that the Smiths' loan application was approved subject to the bank obtaining private mortgage insurance. Evidence at trial established that private mortgage insurance is required in those instances where the purchasers do not have a large enough down payment so the lending institution must obtain additional security for the loan in the form of private mortgage insurance.

On the same day, a Smythe, Cramer Company real estate salesperson notified the Sellers, the Schuldts, that the Smiths' loan was approved subject to the bank obtaining private mortgage insurance. At this point, Sellers informed Smythe, Cramer Company that they wished to consider the secondary offer that had come in. A Smythe, Cramer Company real estate salesperson notified the Schuldts that there was a question whether or not the Smiths had obtained financing within the specified time, and that the Schuldts should consult an attorney before considering another offer on their property. Only after determining that the Schuldts did, in fact, consult an attorney, did Smythe, Cramer Company present the secondary offer for consideration. The Sellers accepted this secondary offer. In response, the Smiths brought suit against Smythe, Cramer Company, its president, L. B. McKelvey, and the manager of the local Smythe, Cramer Company involved in the transaction, Barbara Davis, for racial discrimination in a real estate transaction.

The Smiths' complaint alleged that Smythe, Cramer Company, et al., behavior in this transaction departed from conventional real estate practice resulting in racially discriminatory housing practice. The behavior complained of involved three actions taken by Smythe, Cramer Com-

pany. First, Smythe, Cramer allegedly departed from conventional real estate practice by asking the Smiths to initial some changes made to the Purchase Agreement after the initial signatures. The Trial Court found this a perfectly normal request, as the Smiths' real estate broker also admitted under cross-examination.

The second example of alleged racially discriminatory housing practice engaged in by Smythe, Cramer Company, et al., was a telephone call to the Smiths' residence on Saturday, December 15, 1979, by a secretary of Smythe, Cramer Company. The secretary made the call in response to a telephone call from the Sellers, who assumed that the financing had run out that day for the Smiths. Since the secretary couldn't contact any of the real estate salespeople, she called the Smiths directly. Dr. Smith testified that this telephone call was objectionable because the questions were designed to make him overreact or make him anxious, and that he did not need reminders that financing was due soon. Dr. Smith also testified that the telephone call was objectionable because it fell on the family's Sabbath Day, a day on which they do not transact business. Dr. Smith, though, admitted, on cross-examination, that he never informed anyone, other than his attorney, that he should not be disturbed on the Sabbath Day. Lastly, this telephone call was objectionable because during the course of the conversation, the secretary remarked that she never heard of the bank where the Smiths were obtaining their financing. Dr. Smith testified at Trial that the questions regarding the lending institution were offensive because this was a minority run bank. Though a direct call to the Smiths by a broker may be unusual, the Smiths failed to produce any evidence that this one action was racially discriminating, other than the fact that these complainants found the telephone call upsetting for various personal reasons. The Trial Court did

not find that this telephone call so departed from conventional real estate practice to be racially discriminatory.

The crux of the complaint against Smythe, Cramer Company, et al., revolved around the allegation that Smythe, Cramer Company, et al., told the Sellers that the Smiths did not obtain financing and, based upon this information, the Sellers accepted another offer made by Caucasian buyers. On December 17, 1979, the 15th banking day, Mr. Herman Knight told Barbara Davis of Smythe, Cramer Company that the Smiths' loan application for the property had been approved subject to obtaining private mortgage insurance. The Court of Appeals noted that the Sellers testified that if they had known that private mortgage insurance was likely, they would have approved an extension for the Smiths to get financing. The Court of Appeals' decision dismissed, apparently, the testimony of the Sellers that they accepted the secondary offer only after consulting with an attorney. When December 17, 1979 arrived and financing was not complete, and the Sellers wanted to see the second offer on their property that had come in, Smythe, Cramer Company advised the Sellers to consult an attorney as to the advisability of considering this secondary offer. After all, the Smythe, Cramer Company agents are not attorneys. Presumably, the Sellers' attorney made his own investigation or determination of the financing contingency. The Sellers' decision to consider the secondary offer and accept it, was based strictly on the consultation with their attorney and not on what Smythe, Cramer Company agents said or did.

At the conclusion of the Plaintiffs' case in chief, District Court Judge Lambros granted Smythe, Cramer Company's, et al., Motion for a Directed Verdict. The Court rendered its decision on said Motion in open Court on May 2, 1980. District Court Judge Lambros specifically

found that there was no direct or indirect evidence that Dr. and Mrs. Smith were treated differently from similarly situated white couples in a real estate transaction. The Court determined, from the evidence presented by Plaintiff, that private mortgage insurance is not issued as a matter of course, or *pro forma*. The Trial Court said the most telling evidence that private mortgage insurance *was not* issued *pro forma*, was Dr. Smith's testimony that the application for the insurance was inaccurate when it stated that their checking account had a balance of $10,000.00, when, in fact, it did not. The Court questioned why Plaintiffs would participate in the falsification of the application if private mortgage insurance is granted pro forma. The Court's Order granting a directed verdict in favor of Smythe, Cramer Company, et al., was *not* appealed. Nevertheless, in reaching its decision to reverse the District Court's Order awarding attorney's fees to Defendants, the Court of Appeals made its own finding, effectively reversing the findings of the District Court, that private mortgage insurance is, indeed, granted as a matter of course and regardless of the incorrect data, private mortgage insurance would have been granted. There is no such evidence in the record.

As the prevailing party, Smythe, Cramer Company, et al., filed a Motion for an award of attorney's fees pursuant to the Civil Rights Attorneys Fees Award Act of 1976 (42 U.S.C. §1988) on March 17, 1981. The Motion for an award of attorney's fees was granted on June 1, 1983. In granting Smythe, Cramer Company's, et al., Motion, District Court Judge Lambros found that Plaintiffs were aware at the outset of this action that their primary claim of discrimination was frivolous and without foundation. The Court awarded Defendants the amount of Fifteen Thousand Five Hundred Twenty-five Dollars ($15,525.00) to defend this action.

Thereupon, Plaintiffs appealed to the Sixth Circuit Court of Appeals. In its decision dated February 6, 1985, the Court of Appeals reversed the decision of the District Court.

REASONS IN SUPPORT OF PETITION

In adopting the Civil Rights Attorney's Fees Award Act of 1976 (amending 42 U.S.C. §1988), Congress hoped to eliminate the economic barriers which, heretofore, had prevented the poor, and those others who do not qualify for publicly supported legal aid, from obtaining relief from alleged discriminatory practice. The legislative history of the Act indicates that Congress cast the plaintiff in the role of a "private attorney general," indicating a policy that Congress considered of the highest priority.

Congress, during its consideration of the Act, however, realized that this fee-shifting arrangement increases the danger of a proliferation of frivolous suits initiated to generate statutory fees. 122 Cong. Rec. 31, 474 (1976). Vindication of the Civil Rights Laws by private enforcement must be balanced against the threat of spurious litigation noted Congress. To permit a plaintiff to prosecute an action for discrimination ". . . without fear of liability for the substantial cost to a wrongfully-accused defendant of defending the action would make a one-sided mockery of the enforcement mechanics that Congress has enacted." *Brisbane v. Port Authority of New York,* 550 F. Supp. 222, 224 (S.D. New York 1982). Not only do frivolous lawsuits unreasonably tax the resources of the parties who have violated no law, but also postpone ". . . the time when other worthy claimants waiting to be heard, can be heard, not to speak of public resources that are expected to be put only to the best necessary use." *Lacy v. General Electric Co.,* 558 F. Supp. 277, 279 (E.D. Pa. 1982).

A prevailing defendant does not receive the same favorable treatment as the prevailing plaintiff when it comes time to award attorney's fees. Ordinarily, prevailing plaintiffs have recovered attorney's fees unless special circumstances would render such an award unjust. Senate Report No, 94-1011 (June 29, 1976), 1976 *U.S. Code Cong. and Ad. News* 5908, 5912. A prevailing defendant may be awarded his attorney's fees upon a finding that plaintiff's action was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978). Such a standard is *not* as stringent as the traditional American rule for awarding attorney's fees, under which a prevailing party is awarded attorney's fees only when the opponent has litigated in bad faith, vexatiously, wantonly or for oppressive reasons. *Id.*, at 419. The Court of Appeals, in reversing the District Court's decision held that a prevailing defendant can be awarded his fees only upon a showing of bad faith or ". . . the defects in the suit are of such magnitude that plaintiff's ultimate failure is clearly apparent. . . ." *Smith v. Smythe, Cramer Company*, 754 F.2d 180, 183 (6th Cir. 1985). The Court of Appeals clearly is using the bad faith test, which was rejected by this Court in *Christiansburg Garment Co. v. E.E.O.C., supra*, as the proper test.

In applying the standard of *Christiansburg Garment Co. v. E.E.O.C.*, District Court Judge Lambros determined that Plaintiffs-Respondents were aware at the outset of this action that their primary basis for their claim of discrimination was frivolous and without foundation. *Smith v. Smythe, Cramer Co.*, 571 F. Supp. 58, 60 (N.D. Ohio 1983). The District Court concluded that Plaintiffs-Respondents obviously knew at the outset that their claim that private mortgage insurance is issued as a matter of course was false and frivolous since they participated in

falsifying the application for such insurance. The District Court asked, if the insurance was issued as a matter of course, why did they falsify the application.

The Court of Appeals held that since the misconduct (falsification of the application) was not known by Defendants-Petitioners, the misconduct had no effect on the actions of Defendants-Petitioners, and, therefore, has no effect on Plaintiffs-Respondents' claim. *Smith v. Smythe, Cramer Co.*, 754 F.2d 180, 185 (6th Cir. 1985). An inquiry into the knowledge, or lack thereof, of a plaintiff's misconduct by defendant is certainly valid when a charge of racial discrimination is considered on its merits. However, the inquiry herein is whether an award of attorney's fees is proper. The focus of such an inquiry must shift to Plaintiffs' basis for bringing the lawsuit. Plaintiffs-Respondents herein argued that they had a reasonable belief that private mortgage insurance was issued as a matter of course when they filed the complaint against Defendants-Petitioners. District Court Judge Lambros in deciding the merits of the case found that private mortgage insurance is *not* issued as a matter of course, and, in considering the motion for attorney's fees, the Judge found that Plaintiffs-Respondents were obviously aware that this was so, since they felt it necessary to falsify their loan application. Obviously, Defendants-Petitioners' knowledge, or lack, of this misconduct has nothing to do with the inquiry into whether Plaintiffs-Respondents had a reasonable belief that there was a factual basis for their Complaint.

The exercise of discretion in a matter of this sort is not reversible by an Appellate Court unless clear abuse is shown, and it is not ordinarily possible to determine that question except in light of the whole record. *Allen Calculators v. National Cash Register*, 322 U.S. 137, 88 L.

Ed. 1188, 64 S. Ct. 905, *reh. den.* 322 U.S. 771, 88 L. Ed. 1596, 64 S. Ct. 1257 (1944). Had the Court of Appeals reviewed the whole record, it would have discovered, as was pointed out in the Brief of Petitioners, that the private mortgage issue was really a subterfuge by the Plaintiffs-Respondents. The fact is that when the issue of accepting another offer was brought up by the Sellers, Defendants-Petitioners advised Sellers to consult their attorney. Real estate brokers and salesmen are prohibited, under penalty of revocation of their license, to perform any service for another constituting the practice of law, under Ohio law. O.R.C. §4735.18 (FF). Whether or not private mortgage insurance is issued as a matter of course and whether or not Sellers were legally able to accept another offer after December 17, 1979, was not a determination that was made by Smythe, Cramer Company, or its agents, but by Sellers with the help of their attorney. Only after Sellers informed Smythe, Cramer Company that they did, in fact, consult an attorney, and still wished to consider the secondary offer, did Smythe, Cramer Company present the secondary offer. In light of this fact, the issue of private mortgage insurance becomes a non-issue. Moreover, Plaintiffs-Respondents offered no evidence that directing the Sellers to consult an attorney was outside of conventional real estate practice or in any way racially discriminatory.

In a per curiam decision, this Court in *Hughes v. Rowe*, 449 U.S. 5 (1980) implied that the educational background of the unsuccessful plaintiff may be considered when applying the *Christiansburg Garment Co.* standard. The Court vacated an award of attorney's fees entered against an educationally handicapped inmate of the Illinois State Penitentiary. When considering the case presented herein, it is important to remember that Plaintiffs-Respondents are not educationally handicapped. Plaintiff-

Respondent Dr. William Smith has a bachelor of science degree in architectural engineering, as well as a doctor of medicine degree from Case Western Reserve University School of Medicine. Plaintiff-Respondent Betty Smith, a structural engineer at Davey-McKee Corporation, also has a degree in architectural engineering.

Assuming arguendo, that Plaintiffs-Respondents had a good-faith belief that they were being racially discriminated against, they, nonetheless, could not have maintained that belief throughout these proceedings. This Court held in *Christiansburg Garment Co. v. E.E.O.C.*, that a plaintiff could be assessed his opponent's attorney's fees if plaintiff continues to litigate a case after the lawsuit clearly becomes frivolous, unreasonable or groundless. *Id.* at 422; *see also, Goff v. Texas Instruments, Inc.*, 429 F. Supp. 973 (N.D. Texas 1977). At minimum, Plaintiffs-Respondents must have realized the groundless nature of their claim shortly after filing their Complaint. Depositions were taken of all the witnesses that were eventually to be called at trial. Dorothy Schuldt, one of the Sellers, testified at trial, and in her deposition, that Smythe, Cramer Company advised her and her husband to consult an attorney regarding the transaction. Knowing that Sellers herein acted to accept the secondary offer after December 17, 1979, on the advice of their attorney, and not on information or advice of Smythe, Cramer Company, as well as Plaintiffs-Respondents' admission that the application for private mortgage insurance was incorrect as to their assets, thus indicating knowledge that private mortgage insurance is not issued *pro forma*, Plaintiffs-Respondents nonetheless, persisted in continuing this lawsuit beyond the point that it was clearly frivolous and groundless.

Our Nation has a strong public policy to encourage private enforcement of Civil Rights Laws. There must also

be a strong public interest in maintaining a check on groundless Civil Rights litigation. Defense of this type of lawsuit can be a costly proposition. As one commentator noted:

> . . . the risks of an adverse judgment are substantial, given the complexity and fluidity of the law. Thus for many defendants, settlement—even of baseless claims—may be the best economic avenue available. Even when the suit is litigated all the way to a final judgment in the defendant's favor, the costs remain high, ... Thus the net effect of a baseless suit, whether settled or litigated to a conclusion, is to impose an unnecessary burden on the defendant, on commerce, and eventually on society as a whole.

Timothy J. Heinz, *Attorney's Fees For Prevailing Title VII Defendants: Toward A Workable Standard,* UNIV. OF TOLEDO L. REV. 8:259 (Winter 1977)

Petitioners respectfully request that a writ of certiorari issue herein and that this case and the fundamental questions which it presents be assumed by this Court.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided February 6, 1985)

No. 83-3466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DR. WILLIAM A. SMITH and MRS. BETTY SMITH,
Plaintiffs-Appellants,

vs.

SMYTHE-CRAMER COMPANY, L. B. McKELVEY, as President of Smythe-Cramer Company, BARBARA DAVIS, Individually and as Agent of Smythe-Cramer Company, WILLIAM J. SCHULDT and DOROTHY SCHULDT,
Defendants-Appellees.

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754 F. 2d 180

After directed verdict was entered in favor of real estate company in fair-housing action brought against the company for alleged racially discriminatory refusal to sell residence to plaintiffs, defendants moved for attorney fee award. The United States District Court for the Northern District of Ohio, Thomas D. Lambros, J., 571 F.Supp. 58, granted motion, and plaintiffs appealed. The Court of Appeals, Harry Phillips, Senior Circuit Judge, held that the district court abused its discretion in awarding attorney fees to prevailing defendants in the action, since even if there was a misrepresentation on plaintiffs' loan application

form, that did not affect plaintiffs' belief that, in light of perceived deviations from ordinary real estate practices, they were victims of racial discrimination, a belief for which a sufficiently adequate basis existed to preclude finding that the suit was frivolous, unreasonable, or without foundation.

Reversed.

Before EDWARDS* and JONES, *Circuit Judges*, and PHILLIPS, *Senior Circuit Judge*.

Appellants appeal from the order of the district court assessing against them their opponents' attorneys fees after granting a directed verdict to defendants-appellees. This case requires us to review the standards for awarding attorneys fees to prevailing defendants in actions to enforce civil rights laws.

I

Plaintiffs, Dr. William and Mrs. Betty Smith, a black couple, brought this fair housing action pursuant to 42 U.S.C. §§ 1981 and 1982 and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3601-3619. Plaintiffs alleged that defendants Smythe-Cramer Company, its agents, and William and Mrs. Dorothy Schuldt, refused to sell a home to them because of their race. After the district court issued a temporary restraining order, which subsequently was vacated, preventing sale of the property to a third party, the Schuldts agreed to sell the property to the Smiths and were dismissed from the case. The case proceeded to trial and the district court directed a verdict for the remaining defendants at the close of plaintiffs' case. Subsequently, the court awarded attorneys fees to defendants

*The Honorable George Edwards took senior status January 15, 1985.

in the amount of $15,525.00 for defending the action. *Smith v. Smythe-Cramer Co.*, 571 F.Supp. 58 (N.D. Ohio 1983). Plaintiffs appeal only from the order awarding attorneys fees.

On November 26, 1979, appellants entered into a sales agreement with the Schuldts for a house located at 3600 Lytle Road, Shaker Heights, Ohio. The property was listed by Ms. Betty Miller, a real estate salesperson associated with Smythe-Cramer's Shaker Heights office. The agreement provided for a purchase price of $82,000.00, a ten percent downpayment, and was contingent upon the Smiths obtaining conventional financing for the balance of the purchase price within fifteen banking days. The period was to expire on December 17, 1979.

The Smiths applied for financing with the First Bank National Association, a minority-owned bank. They previously had applied for financing to purchase another house, but the loan had failed because the bank failed to verify Dr. Smith's employment properly. That application, dated October 1, 1979, remained on file with the bank. Herman Knight, the Smiths' loan officer at First Bank, used the October 1 application in connection with the purchase agreement for the Lytle Road property. Knight entered additional information on the application and incorrectly listed certain funds as an asset rather than a liability. These funds were loans offered to minority medical school graduates as an inducement to remain in the Cleveland area. Plaintiffs did not re-sign the application even though the data on it was amended.

On December 17, 1979, Knight informed Ms. Barbara Davis, Manager of Smythe-Cramer's Shaker Heights office, that the Smiths' loan application was approved, subject to approval of private mortgage insurance (PMI). Con-

trolling law required PMI approval as a condition for the grant of the loan. Knight informed Davis that he was confident the PMI would be granted and that he already had discussed it with the private mortgage insurance company. That same day, listing agent Ms. Betty Miller contacted Mrs. Schuldt, informing her that the financing had not been approved.

Despite testimony at trial that PMI is approved routinely and that it is customary to hold an offer open pending approval, Miller did not advise Mrs. Schuldt of the likelihood of approval but suggested that she contact an attorney to determine whether to hold the offer open. Mrs. Schuldt testified she and her husband probably would have granted an extension if they had known the PMI probably would be approved. Instead, they opened and accepted a subsequent offer from a white couple on December 19. This offer was presented through Smythe-Cramer Company. The Smiths' PMI application was approved on December 20.

II

The standards for awarding attorneys fees to prevailing defendants are well established. The statute allowing recovery of attorneys fees applicable to this case is 42 U.S.C. § 1988, which provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[1]

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1. *See also* Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845, 868.

The fee awards provision under the Fair Housing Act, 42 U.S.C. § 3612(c), authorizes awards only to prevailing plaintiffs who are financially unable to assume the fees. The district court awarded attorneys fees to defendants under section 1988.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Supreme Court considered the attorneys fees provision under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The Court held that while prevailing plaintiffs are entitled to attorneys fees under that statute in all but special circumstances, prevailing defendants are entitled to attorneys fees much less frequently. *See id.* at 417-18, 98 S.Ct. at 698. Relying on the legislative history to Title VII, the Court found that Congress intended to provide incentives for private enforcement of the civil rights laws while at the same time affording some protection to defendants from litigation "having no legal or factual basis." *Id.* at 420, 98 S.Ct. at 699. Noting that defendants would be entitled to attorneys fees even in the absence of a statute for suits brought in subjective bad faith, *id.* at 419, 98 S.Ct. at 699, the Court held that bad faith is not required for recovery. "In sum," the Court held, "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421, 98 S.Ct. at 700..

The *Christiansburg* Court stressed that a district court must resist the urge to engage in "post hoc reasoning" and the "hindsight logic" of concluding a suit is without foundation because the plaintiff ultimately does not prevail. *Id.* at 421-22, 98 S.Ct. at 700. The Court noted that a plaintiff may have an entirely reasonable ground for bring-

ing suit even when the law or facts appear questionable or unfavorable at the outset. *Id.* at 422, 98 S.Ct. at 700. Therefore, a plaintiff should not be assessed his opponent's attorneys fees unless the court finds the claim was groundless at the outset or "that the plaintiff continued to litigate after it clearly became so." *Id.* The Court therefore affirmed the district court's denial of fees, finding the EEOC's attempt to bring an unpursued two-year-old claim as a "pending" case was an issue of first impression under a new statute and was not without foundation.

Section 1988 contains a similar attorneys fees provision to that in Title VII. Although the legislative history to section 1988 speaks of allowing awards to defendants where the plaintiff brings an action in "bad faith," it also makes clear that Congress intended that the standards for awarding fees under section 1988 should be the same as those under Title VII and other acts allowing awards of attorneys fees. Attorneys Fees Awards Act, S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912. Therefore, the Supreme Court in *Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam) held that the *Christiansburg* standards apply to suits subject to the fee provisions of section 1988. *See also Tarter v. Raybuck,* 742 F.2d 977, 985-86 (6th Cir. 1984) (*Christiansburg* standards apply to section 1983 suit).

Application of these standards requires inquiry into the plaintiffs' basis for bringing suit. Awards to prevailing defendants will depend on the factual circumstances of each case. While a showing of bad faith is not required for an award of attorneys fees to a prevailing defendant, such a showing would justify an award of fees. Additionally, courts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff's position or the defects in the suit are of such magnitude that

the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate. As the Supreme Court emphasized in *Hughes*, however, the mere fact that allegations prove legally insufficient to require a trial does not, for that reason alone, render a complaint groundless under *Christiansburg*. 449 U.S. at 16, 101 S.Ct. at 179.

In *Tonti v. Petropoulous*, 656 F.2d 212 (6th Cir.1981), this Court affirmed an award of attorneys fees to the defendant where the plaintiff brought a section 1983 suit in federal court seeking to relitigate matters that already had been determined clearly and finally in the state courts. The plaintiff had brought two rounds of challenges in the state courts to a probate court decision, alleging fraud and collusion on the part of the probate judge. Holding that the plaintiff's case represented a misuse of section 1983 to attack collaterally final state judgments and to obtain probate jurisdiction in federal court, this Court affirmed the fees award of the district court. *Id.* at 215-16. Other courts have awarded fees where plaintiffs misuse the courts to challenge consent decrees or matters resolved in previous cases or bring claims that are clearly barred by unambiguous case law. *E.g., Werch v. City of Berlin*, 673 F.2d 192 (7th Cir.1982); *Prate v. Freedman*, 583 F.2d 42 (2d Cir. 1978); *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir.1976); *Hepperle v. Panama Machinery & Supply Co.*, 532 F.Supp. 1085 (N.D.Fla.1982), *appeal dismissed*, 710 F.2d 838 (11th Cir.1983); *Life Science Church v. Vocke*, 531 F.Supp. 790 (E.D.Wis.1982); *Whiten v. Ryder Truck Lines, Inc.*, 520 F.Supp. 1174 (M.D.La.1981).

In other cases, awards of attorneys fees will depend on the legal or factual sufficiency of a claim. In *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir.1984), this Court over-

turned an award of attorneys fees to prevailing defendants in a section 1983 action. The plaintiffs brought suit against school administrators who searched the plaintiff student for marijuana after the administrators had reasonable suspicion to believe he had engaged in an illegal transaction with other students. This Court rejected the district court's finding that the search was consensual and, observing that the scope of a student's fourth amendment rights and the authority of school officials to conduct searches were unresolved issues of law, held that the plaintiffs' suit was not without foundation. *Id.* at 986-87. Therefore, we held that the district judge had abused his discretion by assessing against the plaintiffs their opponents' attorneys fees. *Id.* at 986. While observing that the district court properly had directed a verdict for the defendants, this Court cautioned against too frequent assessments of attorneys fees in light of the overriding congressional policy of encouraging citizens to vindicate constitutional rights. *Id.* at 984.

Other courts have stressed that prevailing defendants should not be awarded fees where the plaintiff has an arguable basis for pursuing his or her claim. In *Clark v. Universal Builders,* 706 F.2d 204 (7th Cir.1983), the court affirmed a denial of fees where the plaintiffs lost their claim of discriminatory pricing of houses in black neighborhoods. Examining the circumstantial evidence including lower prices in a white subdivision, the court held the plaintiffs' claims were clearly not frivolous, unreasonable or without foundation, even though the housing was found not comparable. *Id.* at 213. In *White v. South Park Independent School District,* 693 F.2d 1163 (5th Cir.1982), the court reversed an award of attorneys fees where the plaintiff challenged his termination from employment. Although the court held he was not discharged for an im-

permissible reason but for emotional problems and threats to other faculty members, it stressed that his claim was supported by his previous popularity and high evaluations. *Id.* at 1170. Finally, in *Mongomery v. Yellow Freight System, Inc.*, 671 F.2d 412 (10th Cir.1982), the court refused to assess fees in an employment discrimination case. The court rejected the plaintiff's assertion that his discharge for sleeping on the job was proved to be pretextual by a supervisor's isolated disparaging remark about blacks. The court refused to award attorneys fees to the defendant, however, holding. "In order to penalize the plaintiff with attorney's fees, we must be persuaded that the record is devoid of any evidence of discrimination." *Id.* at 414. *See also Hughes v. Repco*, 578 F.2d 483, 489 (3d Cir.1978) (considering the litigant's good faith in denying assessment of attorneys fees against the plaintiff).

Courts that have awarded fees to prevailing defendants have emphasized the lack of evidence of unconstitutional acts presented by the plaintiff. *E.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir.1983) (no evidence of discrimination and want of prosecution), *on reconsideration*, 722 F.2d 209 (5th Cir.), *cert. denied*, ... U.S. ....., 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984); *Campbell v. Cook*, 706 F.2d 1084 (10th Cir.1983) (salary reduction clearly based on the plaintiff's improper collection of fees); *American Family Life Assurance Co. v. Teasdale*, 564 F.Supp. 1571, 1573 (E.D.Mo.1983), *aff'd*, 733 F.2d 559 (8th Cir. 1984); *Lacy v. General Electric Co.*, 558 F.Supp. 277, 278 (E.D.Pa.1982); *Brisbane v. Port Authority*, 550 F.Supp. 222, 223 (S.D.N.Y.1982); *Goff v. Texas Instruments, Inc.*, 429 F.Supp. 973, 976 (N.D.Tex.1977).

III

The district court in the present case held that "plaintiffs were aware at the outset of this action that their primary claim of discrimination was frivolous and without foundation." *Smith v. Smythe-Cramer Co.*, 571 F.Supp. 58, 60 (N.D.Ohio1983). Although the court relied upon the *Christiansburg* standards, it focused on the incorrect entries on plaintiffs' loan application listing the minority grant loan proceeds as an asset rather than a liability. The court concluded that the incorrect entries showed that plaintiffs had "falsified" their loan application and were therefore aware that PMI is "not customarily issued as a matter of course" or "in a pro forma manner." *Id.* at 60. The court held that "plaintiffs' evidence clearly demonstrated that they knew their claim of discrimination was clearly without foundation," and that this case was appropriate for "the drastic sanction of awarding attorney's fees to the prevailing defendant." *Id.* at 61.

We conclude that the district court abused its discretion by awarding attorneys fees to defendants. The court had no basis for concluding that plaintiffs themselves were responsible for, or even aware of, the incorrect data on the loan application form. Moreover, there was testimony that the incorrect data on assets would have no effect on the grant of PMI. Additionally, the overwhelming weight of the evidence was that PMI is indeed granted as a matter of course, and two experts testified it was withheld in fewer than one percent of applications they had processed. As stated previously, PMI was approved in this case.

Not only was there no basis for the court's conclusion that plaintiffs were guilty of misconduct, if there had been misconduct it would not have affected the validity of plaintiffs' claim. Defendants were not aware of the in-

accuracies on the PMI application when they took the actions challenged below as discriminatory: not advising the Schuldts that plaintiffs' banker anticipated formal approval soon and other perceived departures from normal real estate practice. The inaccuracies had no effect on the defendants' actions or the plaintiffs' belief that they were victims of discrimination.

In a case such as this where any misconduct would not affect the plaintiff's belief that he or she was a victim of discrimination, it is improper to assess fees on that basis. In *Price v. Pelka,* 690 F.2d 98 (6th Cir.1982), this Court held that the plaintiff's perjury during a hearing was not an appropriate basis for denying attorneys fees where she was successful on the merits. The plaintiff proved a violation of the Fair Housing Act and the defendants admitted liability, but the plaintiff later perjured herself by testifying that she was married and denying that she had been evicted from a previous tenancy. The Court stressed that liability was not affected by the perjured statements and ordered an award of attorneys fees to the successful plaintiff. *Id.* at 101.

The same policy should apply in the case of an unsuccessful plaintiff where misconduct would not affect the ultimate issue of the defendant's liability or the plaintiff's basis for believing that discrimination has occurred. *Cf. Carrion v. Yeshiva University,* 535 F.2d 722, 728 (2d Cir. 1976) (the plaintiff's perjury is considered where it bears on the determination that the charges are without foundation and brought maliciously). *See also Hughes v. Repko,* 578 F.2d 483, 489 (3d Cir.1978) (the unsuccessful plaintiff's good faith in bringing suit may be considered in denying an award of attorneys fees).

IV

Plaintiffs have presented an adequate basis for their suit to avoid the conclusion that it is frivolous, unreasonable, or without foundation. In addition to their challenge to Smythe-Cramer's failure to inform the Schuldts that PMI approval was anticipated and that it was customary to wait one or two days for final approval, plaintiffs alleged that Smythe-Cramer took inappropriate actions and required more from them than from other customers.

On December 5, plaintiffs' realtor informed them that Smythe-Cramer, in requiring plaintiffs to initial changes in the date of possession, was requiring more than was customary. Smythe-Cramer was not satisfied with the resigning of the contract and required plaintiffs to initial the changes by that evening or the company would entertain another offer. On Saturday, December 15, the Smythe-Cramer agent telephoned plaintiffs at home to inquire into the progress of their loan. The agent apparently was mistaken in her belief that the fifteenth was the final day for loan approval and informed Dr. Smith of this belief. In addition, the agent asked where the Smiths had obtained financing and expressed surprise when Dr. Smith mentioned the minority-owned bank, saying she had never heard of it. Dr. Smith was disturbed by the agent's attitude and persistent questions. He was informed by his own agent that it is a departure from normal practice to call directly the client of another agent.

The main thrust of the complaint was that defendants deviated from ordinary real estate practices when they did not advise the Schuldts that the Smiths' application for PMI was excepted to be approved in a few days and that it would avoid a complicated transaction to allow a short extension. Plaintiff's banker, Mr. Knight, had as-

sured Smythe-Cramer that PMI approval was forthcoming. Knight had informed Dr. Smith that PMI approval was almost automatic; Dr. Smith anticipated no barrier to final sale. Other witnesses testified to the routine nature of PMI approval. Agent Davis of Smythe-Cramer, testified that it is the "normal course" to allow extra time to meet such contingencies before opening for new bids.

Plaintiffs' belief that these departures from ordinary practice were due to their race was based on the advice of professionals familiar with real estate practice. Their claims of housing discrimination were not without foundation, frivolous or unreasonable. They were supported by some evidence. We conclude that the district court applied the *Christiansburg* standards incorrectly and abused its discretion in awarding attorney fees to defendants. Accordingly, the order of the district court is REVERSED. No costs are taxed. The parties will bear their own costs on this appeal.

ORAL DECISION OF THE UNITED STATES DISTRICT COURT

(May 2, 1980)

Civil Action No. C 80-34

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. WILLIAM A. SMITH, BETTY SMITH,
Plaintiffs,

VS.

SMYTHE CRAMER COMPANY, *et al.*,
Defendants.

J: LAMBROS

(The following proceedings were had in chambers:)

The Court: Having reviewed and reflected on the evidence that has been introduced in the plaintiffs' case in chief and reflected on the arguments of counsel in support and in opposition to the motion for directed verdict, it is my view that reasonable minds cannot differ on the question of fact and that the Court will direct a verdict in favor of the defendant Smythe Cramer and the real estate defendants.

It being the Court's view that the matter as between the sellers raises no factual issues for the jury's determination in that the stipulation has been entered into by and

between the plaintiffs and defendants Schuldt that the Schuldts did not discriminate, all claims and actions against the Schuldts will be dismissed.

And it is my view that the issues raised on the counterclaim do not raise any justiciable issues for the consideration of this Court. The Court will also order a dismissal of the counterclaims.

The Court will set forth its findings of fact and conclusions with respect to these rulings on the record in open court in excusing the jury, and I ask that counsel now assemble in the courtroom for my formal ruling.

(The following proceedings were had in open court in the presence of the jury:)

The Court: Members of the jury, during what is seemingly an inordinate delay in calling you back in the court after this morning's recess, following the close of the plaintiffs' case in chief it was necessary for this Court to consider certain questions at that stage of the trial based on certain motions filed by the real estate defendants.

The real estate defendants moved at the close of the plaintiffs' case in chief for a directed verdict in their favor for the reason that the evidence presented to the jury in the plaintiffs' case in chief did not present questions upon which reasonable minds may differ when construing that evidence most favorably to the plaintiffs.

Jurors are impaneled and assembled to hear disputed questions of fact, and where there are disputed facts upon which reasonable minds may differ on a particular issue it is those factual issues which are to be presented to the jury for its deliberation, its analysis, and its resolution, under proper instructions of the court.

I have heard all the evidence and reviewed it, applying the law as I understand it, and have concluded that based on the plaintiffs' evidentiary presentation there is not sufficient evidence presenting questions upon which reasonable minds can differ when viewing that evidence most favorably to the plaintiffs, and thus I have granted the motion for directed verdict and am entering judgment in favor of the defendant Smythe Cramer.

It would be unfair to the parties and to you, after you have sat here for three or four days, to leave with that determination unless I explain to you the reasons for my determination in withdrawing the issues from the jury, and so I will do that at this time.

There is no question that the national policy has been established that there shall not be any discrimination against persons of different minority races. It has clearly been established by national policy that there shall not be any discrimination on account of race. Those principles stem from the Constitution and the Bill of Rights and were more emphatically advanced in the Civil Rights Act of 1860.

But notwithstanding that national policy that was established, it has not been until modern times, and most recently with the enactment of fair housing laws, Supreme Court decisions, decisions of the courts which have given meaning and vitality to those principles, that today the courts are more sensitive than ever before in the enforcement of those rights and those statutes. Every day in this court and in courts throughout the land we do hear and we consider cases involving civil rights and we are concerned with the correct and proper application of that law so the day will come that America is truly the melting pot where there is no distinction because of one's race, color, creed, sex, tongue, or conditions.

But as a judge, it is my duty and my responsibility to try cases on the facts and the law and to submit cases to the jury where there are sufficient facts upon which reasonable minds can differ. No lawsuit should be taken lightly. No lawsuit should ever be submitted to the jury to indulge in a mission of conjecture or speculation as to the thought processes of the litigants.

Motivation and intention in these types of cases is essential. But before a jury should be compelled and required to explore motivation and intention, there must be a factual foundation from which inferences can be made without indulging in speculation or conjecture as to those motives.

In this case Dr. and Betty Smith, after many years devoted by Dr. Smith in pursuing an education and becoming a doctor, and having concluded his studies and about to enter into the practice of medicine in Cleveland, Ohio, sought the achievement of a dream: to have their own house.

In September—approximately September, but the fall of 1979—they met and engaged the Smythe Cramer real estate agency. They were shown a residence, attempted to negotiate a loan on that residence. They dealt with the First Bank, with Mr. Knight. Mr. Knight testified in this courtroom. He is a person of the black race. That loan was denied.

The relationship between Dr. and Betty Smith and Smythe Cramer did not terminate. Pursuit was made to find another residence, and Smythe Cramer agency had on a multiple listing the Schuldt residence on Lytle Avenue. That house and those prospective sellers were introduced to Dr. and Mrs. Smith and negotiations ensued.

You heard the evidence and there is no dispute in the evidence that there were negotiations in that the Schuldts attempted to sell the house for 89,000. Failing that effort, they turned it over to Smythe Cramer. And then when the Smiths were brought to them I believe their price was 84,000. There was no dispute as to that fact.

Dr. and Betty Smith offered $80,000. They reached an accord and agreement at $82,000 and they executed and signed a binding buy and sell agreement for $82,000 on November 26, 1979. That buy and sell agreement contained a provision that it was subject to the purchaser's ability to obtain financing by a conventional loan within a period of 15 banking days. Although the Schuldts conceived that the 15th banking day, I believe, was December 15th, it is admitted in this case and recognized by the Smythe Cramer agency, and the Smythe Cramer representatives even called to the attention of the Schuldts, that, no, it is not the 15th, it is the 17th.

After that contract was negotiated there were changes with respect to washer and dryer, with respect to occupancy, and other matters. And each of those changes resulted in their being included on the original contract by interlineation and initialing.

One of the factors which the plaintiffs asserted was that they were being either harassed or otherwise troubled by the agency in requiring the initialing. Well, I cannot construe that as an act of discrimination, as that is standard practice which attains in most contracts in real estate negotiations, to require changes to be initialed so that there is no dispute.

I am mindful, when I speak of Smythe Cramer, that the dealings were between the Malone agency and the

Schuldts and they had picked the house up on the multiple listing computer.

We learned, notwithstanding the execution of the contract on November 26, 1979, that the house continued to be shown. However, the parties recognized that the Smiths had a buy and sell agreement and were to pursue the acquisition of financing. The last day was the 17th. Mr. Knight on that date issued a letter that the loan committee had approved the loan, and when inquiries were made the real estate defendants were informed that the loan was approved subject to PMI approval, that is, Private Mortgage Insurance.

It is that fact and circumstance which is urged here as constituting an act of racial discrimination, in that with the knowledge that a loan had been approved, Smythe Cramer proceeded to open the second bid and to negotiate a sale to a white couple.

The evidence is clear that there was a difference in the offers, the Smiths having agreed to purchase for $82,000 on the basis of obtaining a conventional loan, which we learned had to be a 90 percent loan, which required private mortgage insurance, and we know also that the down payment of $10,000 that had to go into escrow was to be obtained from a subsidiary of the Cardinal Savings and Loan in the amount of $10,000, which was to be secured with a second mortgage after First Bank got its mortgage on the $73,000, to make the total purchase price and I assume some other costs.

The second offer which was ultimately opened and a sale negotiated on was for $82,000, 50 percent down, which would obviously have been secured with a first mortgage without the necessity of private mortgage insurance.

What is clear is that First Bank, although approving the loan, could not grant the loan until there was private mortgage insurance.

Now, on the last day, the 17th, what information does the evidence disclose was conveyed to Smythe Cramer? The evidence is that the loan had been approved subject to PMI approval, private mortgage insurance. They were not told by Mr. Knight that he had already talked with PMI and that PMI had orally approved the insurance. They were merely told that PMI approval was required and it was subject to PMI approval.

Plaintiffs assert that by reason of the fact that they were aware of the fact that the loan had been approved subject to PMI approval, when they proceeded to open the second bid and negotiate a sale, I believe on the 18th or 19th, to the second purchaser that conduct was discriminatory and that it had the effect of placing an obstacle in the path of the Smiths because of race.

Now this is not an action for breach of contract. This action is based on racial discrimination, and what must be established in this case for the plaintiffs to prevail is that they were denied an opportunity to purchase the house because of their race.

There is no question that the Smiths are black, the Schuldts are white, and all of the real estate defendants are white. That fact alone is not enough to draw an inference of discrimination, unless there are other facts and circumstances in the evidence to demonstrate that there was a departure from normal, conventional real estate practices.

Rarely, if ever, can a case of racial discrimination be established by direct evidence. Invariably, because of the subtleties involved in transactions between persons of dif-

ferent races, it is very difficult to ascertain and to establish by direct evidence. Very seldom will anyone say, "I will not sell to you because you are black and I will not sell to blacks."

Well, that is direct evidence. We don't have that here. That is not the basis or controlling, in my estimation. My concern here is whether or not we have sufficient evidence presented by the plaintiffs from which the jury may reasonably infer from the facts and circumstances that there was discrimination on account of race.

Now, if the evidence established and there was evidence to establish that there was a departure from normal real estate practices, then I would say, in view of the fact that the Smiths are black and the other defendants are white and then we also have evidence of a departure from normal or conventional real estate practices, then I would submit that question to the jury for the purposes of allowing you to deliberate and determine from all the evidence whether that departure was on account of race.

So, let's deal with that for a few minutes. Was there a departure from normal, conventional real estate practices?

Notwithstanding what others may construe as the purpose and impact of private mortgage insurance, private mortgage insurance is not required in all real estate loans. It is only required in those instances where the purchasers do not have a large enough down payment and the bank then may not grant a loan solely on the basis of the real estate as collateral in the form of a mortgage. They must acquire additional security from an insurance company which agrees that in the event of the default of the purchaser they will pay the bank.

So, what it is, it is an insurance policy, and a premium must be paid and that premium is factored into the monthly payments, and the purchaser, in taking out the bank loan, in addition to paying principal and interest, pays the premium.

Now, the evidence of the plaintiffs and the argument of the plaintiffs is that private mortgage insurance is granted pro forma, that it is granted as a matter of course, and that Smythe Cramer should have known this and should have accepted the fact that when the loan was granted private mortgage insurance would issue and thus there had been compliance with the condition and, by their knowing this and having proceeded to sell to the second purchaser, that that was a departure from normal real estate practices and thus that issue should be considered by the jury to determine whether or not that departure was because of race.

There was no evidence by anyone from PMI, from the Private Mortgage Insurance, no witness called by the plaintiffs from the Private Mortgage Insurance Company who would testify or did testify as to what the practices, procedures and requirements of Private Mortgage Insurance were to be.

There was evidence by Mr. Knight, the loan officer, that he had about 200 PMI applications, but he did not testify that they are all granted merely upon request, albeit very infrequently some had been denied, one or two. That fact alone establishes that it is not pro forma and automatically issued. The Private Mortgage Insurance Company requires an application and a setting forth of assets and liabilities so that they may assess the financial ability of the individual and to assess the risk factors and a determination must be made by them.

So I find that the evidence does not establish nor may reasonable minds differ on the question as to whether or not private mortgage insurance is issued pro forma or as a matter of course, that there are specific, definite requirements which must be met.

But what has clearly established in the plaintiffs' own case that private mortgage insurance is not issued as a matter of course and as a matter of routine procedure without concern is that the plaintiffs' own knowledge demonstrated in the evidence that it was not pro forma and routine, because when the plaintiffs submitted an application for private mortgage insurance the plaintiffs falsified their assets and liabilities by asserting that they had $10,000 in a checking account.

Mr. Knight testified that, well, 10,000 subsequently came in the checking account, we put it in escrow.

Well, it never got into the checking account. The bank statements show that $10,000 was never deposited in Dr. Smith's checking account and the $10,000 was never an asset. That was the money that was borrowed from the Cardinal subsidiary corporation, upon which they were to take a second mortgage. That was a liability, not an asset, never in the checking account.

And Mr. Knight, the loan officer, acknowledged in his own testimony that there was never that $10,000 in the checking account. He acknowledged in his testimony that it was the money that was put in escrow.

The evidence is clear that that $10,000 was a liability. If it was routine and if it was pro forma, was there a necessity for Dr. Smith to have falsified that statement?

I find from the evidence that has been offered that private mortgage insurance is not issued as a matter of

course, is not a pro forma type requirement, but was essential to the ability of Dr. Smith to obtain financing and essential to the First Bank in granting the loan.

Truly, there is no direct evidence that there was any differential treatment between Dr. and Mrs. Smith and white purchasers. So we must look to see whether or not there is indirect evidence or circumstantial evidence that there has been discrimination.

For the plaintiffs to have established enough evidence to submit to you, the plaintiffs must and would have been required to introduce evidence that there was a departure from standard real estate practices. Yet the plaintiffs' own evidence introduced in the plaintiffs' own case refutes that view. Plaintiffs' own evidence was, and real estate agents testified, that there have been instances in the past that PMI has been turned down, although not frequently, but that there have been instances.

And evidence that is more telling that PMI is not routine and is not pro forma was Dr. Smith's own recognition, because he felt it was necessary to falsify his statement of assets to get PMI approval.

Thus, it is the Court's view that those facts introduced in the plaintiffs' own case establish that issuance of private mortgage insurance is not routine.

Therefore, in the analysis, it follows naturally that Smythe Cramer's conduct was not a departure from conventional real estate practices, in that there is no basis in the plaintiffs' own evidence from which to permit the jury to infer that PMI was routine.

I examined the evidence closely for the purpose of determining whether or not there was even the slightest evidence which would demonstrate a departure from con-

ventional real estate practices. I see none. There is no evidence that has been introduced in the plaintiffs' own case that shows that Dr. and Mrs. Smith were treated differently from similarly situated white couples in connection with a transaction requiring private mortgage insurance. That is what I was looking for, was there a variation from conventional real estate practices. Plaintiffs' own evidence contradicts the essential tenet of its own case.

Why must I view this evidence very carefully? If there is sufficient evidence upon which to support an inference of discrimination, the jury should decide it; and if the jury decides it in favor of the plaintiffs, the plaintiffs should receive damages if the plaintiffs were discriminated against.

On the other hand, a charge of racial discrimination is a serious charge. No jury, no court, no litigant should take it lightly. And no case, merely on the basis of an allegation of racial discrimination, should be submitted for consideration unless there is sufficient evidence to permit that inference.

I find from the evidence submitted in the plaintiffs' own case that it is contradictory and the plaintiffs' own evidence establishes no departure from conventional real estate practices and the plaintiffs' own evidence establishes that private mortgage insurance is not routinely issued nor is it issued as a matter of course.

And to repeat, so that there is no question in the record or in the plaintiffs' mind, their own evidence has established that there have been instances of denial; plaintiffs' own evidence establishes that PMI has specific requirements with respect to assets and liabilities; plaintiffs' own evidence establishes that that PMI application was

falsified and that assets of $10,000 were inserted therein which Dr. and Mrs. Smith did not have.

Thus, I find plaintiffs have not submitted enough evidence to establish that the acceptance of the back-up offer was discriminatory nor that the requirement of obtaining initials constituted an act of discrimination.

I thus grant the motion for directed verdict in favor of Smythe Cramer and the individual real estate defendants.

In that the plaintiffs have already entered into a stipulation with the Schuldts that the Schuldts did not discriminate against the Smiths, I approve that stipulation and thus dismiss the claims against the defendants Schuldt.

I find that the cross-complaints filed by the real estate defendants, and others, do not submit any cognizable claims.

Therefore, this action is dismissed and terminated.

Members of the jury, I take this opportunity to thank you for your kind attention and the seriousness with which you have undertaken this responsibility. I have tried to explain to you at length how I have analyzed the situation, which will be subject to review, so that I can, hopefully convince you that my view in this determination was not arbitrary but that I place a great deal of confidence in the jury system and view the jury system with high reverence. I do not believe that it is my function to submit to the jury questions based on speculation or conjecture, but only those issues upon which there is sufficient evidence for reasonable minds to differ. I find there is not sufficient evidence.

Members of the jury, you are now excused. You will receive your jury cards from Miss Miller and proceed to the jury room on the fifth floor and inform them that your services are terminated.

Thank you very much.

CERTIFICATE

I, James N. Kraemer, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

.....

Official Court Reporter

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed February 25, 1981)

No. C-80-34

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. WILLIAM A. SMITH, *et al.*,
Plaintiffs,

v.

SMYTHE, CRAMER COMPANY, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LAMBROS, *District Judge*

Plaintiffs, two black Americans, have alleged that the defendant real estate company refused to sell them a residence located at 3600 Lytle Road, Shaker Heights, Ohio, in contravention of 42 U.S.C. §§1981 and 1982 and 42 U.S.C. §§3612 and 3617. Plaintiffs having presented their case-in-chief to the jury, this Court finds upon motion of the defendant that plaintiffs have presented no factual issues for the jury's determination and that defendants are entitled to judgment as a matter of law.

Specifically, this Court makes the following findings of fact:

1. That William A. and Betty Smith are black Americans.

2. That in the fall of 1979 they engaged the John P. Malone Company to find them a house which they could purchase for use as a personal residence.

3. That at about the same time Mr. and Mrs. William J. Schuldt entered into a listing contract with defendant Smythe, Cramer Co. in order to sell their residence located at 3600 Lytle Road, Shaker Heights, Ohio.

4. That through the auspices of the Multiple Listing Service, the Smiths were shown the Schuldt's property on Lytle Avenue.

5. That on November 26, 1979 the Smiths entered into a written contract to purchase the Lytle Road property for $82,000.

6. That the contract referred to in paragraph 5 contained a provision making it subject to the purchaser's ability to obtain conventional financing within a period of fifteen (15) banking days.

7. That the contingency referred to in paragraph 6 expired on December 17, 1979.

8. That after the contract referred to in paragraph 5 was executed, there were changes made with respect to the date of occupancy and with regard to the inclusion of the washing machine and dryer, and that these changes were included in the original agreement by interlineation and initialing by the parties to the sale.

9. That it is standard practice when such real estate contracts are modified by interlineation to have the parties thereto initial the changes.

10. That the house continued to be shown between November 26 and December 17, 1979, with the understanding that there was a contingent contract outstanding on the property.

11. That the Smiths sought conventional financing through the First Bank National Association and that they sought to borrow 90% of the purchase price of the Lytle Avenue property.

12. That private mortgage insurance (PMI) was required by federal law in order for First Bank National Association to lend the Smiths the amount of financing they required for the Lytle Avenue property.

13. That on December 17, 1979, the First Bank National Association, through its vice president Mr. Herman Knight, informed defendant Smythe, Cramer that the Smith's loan application had been approved "subject to PMI approval."

14. That First Bank National did not submit the Smith's application for PMI to the American Mortgage Insurance Company until December 18, 1979.

15. That the issuance of private mortgage insurance is not done pro forma and as a matter of course.

16. That on December 19, 1979, an agent of defendant Smith, Cramer Company presented to the Schuldts a subsequent offer made on the Lytle Avenue property in the amount of $82,000 with a 50% downpayment.

17. That on December 19, 1979, the Schuldts accepted this second offer made by Smith, Cramer Company on behalf of Charles Fuller.

18. That the actions taken by defendant, Smith, Cramer in presenting the Schuldts the subsequent Fuller offer did not constitute a departure from conventional real estate practice.

19. That Charles Fuller, Mr. and Mrs. William Schuldt, and the principals of Smith, Cramer Company are white.

20. That the American Mortgage Insurance Company mailed its approval of the Smiths' PMI application on December 20, 1979.

Upon these findings of fact, this Court now makes the following conclusions of law.

1. That the insistence by defendant Smythe, Cramer Company that Smiths initial all interlineated changes in the buy-sell agreement did not constitute harassment or any other type of discrimination based on race.

2. That the act of defendant Smith, Cramer in negotiating a sale to the Fullers after the expiration of the Smiths' fifteen-day financing contingency was done upon legitimate business considerations and not done in order to place an obstacle in the way of the Smiths because of their race.

3. That none of the actions taken by Smith, Cramer Company were a departure from conventional real estate practice such as would evidence discrimination based upon race.

Upon the foregoing findings of fact and conclusions of law, the Court directed a verdict in favor of defendant Smith, Cramer, Co.

This Court hereby approves the stipulation entered into by the parties that the Schuldts did not discriminate against the Smiths, and hereby dismisses any and all claims against them. The Court further finds that the cross-complaints filed by defendants do not raise any cognizable cause of action and hereby dismisses those claims.

This action is hereby dismissed and terminated.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge

POST-JUDGMENT MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Dated June 1, 1983)

No. C 80-34

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. WILLIAM A. SMITH, *et al.*,
Plaintiffs,

v.

SMYTHE, CRAMER COMPANY, *et al.*,
Defendants.

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571 F. Supp. 58

After directed verdict was entered in favor of real estate company in civil rights action brought against company for alleged racially discriminatory refusal to sell residence to plaintiffs, defendants moved for award of attorney fees pursuant to § 1988. The District Court, Lambros, J., held that: (1) evidence established that plaintiffs were aware at outset of action that primary claim of discrimination was frivolous and without foundation, and defendants were entitled to award of reasonable attorney fees against plaintiffs; (2) plaintiffs' counsel could not be said to have willfully abused judicial process and counsel would not be required to bear portion of attorney fee award; and (3) award of $15,525 in attorney

fees, based upon 207 hours, and $452.44 in costs and expenses incurred by real estate company in successful defense of action, was reasonable.

So ordered.

POST-JUDGMENT MEMORANDUM OPINION AND ORDER

LAMBROS, *District Judge.*

This was a civil rights action pursuant to 42 U.S.C. §§ 1981, 1982, 3612, and 3617 in which plaintiffs claimed that the defendant real estate company refused to sell them a residence because of their race. A directed verdict was entered in favor of defendant Smythe, Cramer Company following plaintiffs' presentation of their case-in-chief to the jury. Judgment was entered accordingly.

Defendants Smythe, Cramer Company, L.B. McKelvey, and Barbara Davis have moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendants' position is that the action was "baseless, frivolous, and without grounds" and that fees should be awarded against both the non-prevailing plaintiffs and their counsel.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Supreme Court of the United States considered "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant* in a Title VII [of the Civil Rights Act of 1964] action." 434 U.S. at 417, 98 S.Ct. at 698 (emphasis in original). The Court held:

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was

> frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Id. at 421, 98 S.Ct. at 700.

In *Tonti v. Petropoulous,* 656 F.2d 212 (6th Cir.1981), the United States Court of Appeals for the Sixth Circuit affirmed a district court decision that had applied the *Christiansburg Garment* standard to an award of prevailing defendant's attorney's fees pursuant to 42 U.S.C. § 1988. Therefore, defendants in this action are entitled to an award of attorney's fees if, without regard to the existence of subjective bad faith, plaintiffs' action was "frivolous, unreasonable, or without foundation."

In the autumn of 1979 Mr. and Mrs. William J. Schuldt entered into a listing contract with defendant Smythe, Cramer Company in an effort to sell their residence on Lytle Road in Shaker Heights, Ohio. On November 26, 1979 plaintiffs entered into a written contract to purchase the Lytle Road property for eighty two thousand dollars ($82,000). This written purchase agreement contained a provision that made the sale contingent upon plaintiffs' ability to obtain conventional financing within fifteen (15) banking days. The fifteen (15) day period expired on December 17, 1979.

Smythe, Cramer Company continued to show the Lytle Road property to prospective buyers during the period from November 26 through December 17, 1979 with the understanding that there was an outstanding contingent purchase contract for the property.

Plaintiffs sought to borrow ninety percent (90%) of the purchase price through conventional financing at First Bank National Association. Plaintiffs were required by federal law to obtain private mortgage insurance (PMI)

as a condition precedent to being granted the loan by First Bank National Association. On December 17, 1979 First Bank National Association Vice-President Herman Knight informed Smythe, Cramer Company that plaintiffs' loan had been approved "subject to PMI approval."

On December 18, 1979 First Bank National Association submitted plaintiffs' PMI application to the American Mortgage Insurance Company. On December 19, 1979 an agent of Smythe, Cramer Company presented to the Schuldts a subsequent offer to purchase the Lytle Road property for eighty two thousand dollars ($82,000), including a fifty percent (50%) downpayment. The Schuldts accepted this subsequent offer on the same day.

Plaintiffs' primary claim of discrimination was that, although they had obtained financing as of December 17, 1979 in accordance with the purchase agreement, Smythe, Cramer Company refused to proceed with the sale, continued to solicit other prospective buyers, and ultimately consummated a sale of the Lytle Road property to caucasin buyers. The basis of the claim was that PMI was customarily issued as a matter of course, that Smythe, Cramer Company should have known this, and that Smythe, Cramer Company therefore should have known that there was no genuine contingency to their having obtained financing at the time it continued to solicit other buyers and ultimately consummated the sale to the caucasian buyers.

The evidence at trial established that PMI was not customarily issued as a matter of course or in a pro forma manner. Furthermore, that the plaintiffs had falsified the financial statement portion of their PMI application indicated that they knew PMI was not customarily issued as a matter of course.

> But what was clearly established in the plaintiffs' own case that private mortgage insurance is not issued as a matter of course and as a matter of routine procedure without concern is that the plaintiffs' own knowledge demonstrated in the evidence that it was not pro forma and routine, because when the plaintiffs submitted an application for private mortgage insurance the plaintiffs falsified their assets and liabilities by asserting that they had $10,000 in a checking account.
>
> Mr. Knight testified that, well, 10,000 subsequently came in the checking account, we put it in escrow.
>
> Well, it never got into the checking account. The bank statements show that $10,000 was never deposited in Dr. Smith's checking account and the $10,000 was never an asset. That was the money that was borrowed from the Cardinal subsidiary corporation, upon which they were to take a second mortgage. That was a liability, not an asset, never in the checking account.
>
> And Mr. Knight, the loan officer, acknowledged in his own testimony that there was never that $10,000 in the checking account. He acknowledged in his testimony that it was the money that was put in escrow.
>
> The evidence is clear that that $10,000 was a liability. If it was routine and if it was pro forma, was there a necessity for Dr. Smith to have falsified that statement?

Transcript of oral ruling, May 2, 1980, at 15-16.

It is apparent that plaintiffs were aware at the outset of this action that their primary claim of discrimination was frivolous and without foundation. Defendants are

therefore entitled to an award of reasonable attorney's fees against plaintiffs.

Defendants seek to have plaintiffs' counsel bear a portion of the attorney's fees award in this action. Whether a court may exercise its inherent power to assess attorney's fees against counsel depends on whether counsel may be found to have willfully abused the judicial process. *Glass v. Pfeffer*, 657 F.2d 252, 257 (10th Cir.1980), citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67, 100 S.Ct. 2455, 2464-65, 65 L.Ed.2d 488 (1980). While plaintiffs' primary claim may be characterized as having been without foundation, it is not a situation in which plaintiffs' counsel may be said to have willfully abused the judicial process. Plaintiffs' counsel shall not be required to bear a portion of the attorney's fees award.

In support of their motion for attorney's fees defendants submit the affidavit of attorney Henry DuLaurence. The affidavit indicates that attorney DuLaurence and his associate, Mary Beth Ballard, spent two hundred seven (207) hours in the defense of this action. Exhibit "A" to the affidavit itemizes the manner in which the hours were spent. Attorney DuLaurence also affies that he is primary legal counsel for Smythe, Cramer Company and that he bills the Company at the hourly rate of seventy-five dollars ($75.00) for his and his associate's services. The affidavit indicates that Smythe, Cramer Company therefore incurred attorney's fees expense in the amount of fifteen thousand five hundred twenty five dollars ($15,525.00) to defend this action. The affidavit also itemizes four hundred fifty two dollars and forty four cents ($452.44) in costs and expenses incurred by Smythe, Cramer Company during the defense of this action.

A review of the affidavit and the itemized statement of hours and expenses indicates that the hours spent by

the attorneys, the hourly rate charged by the attorneys, and the costs and expenses incurred are reasonable. Therefore, defendants are entitled to receive from plaintiffs a total of fifteen thousand nine hundred seventy seven dollars and forty four cents ($15,977.44) in attorney's fees and related expenses.

This Court notes in closing that an award of prevailing defendant's attorney's fees pursuant to 42 U.S.C. § 1988 must be made with great care. Such awards are drastic sanctions that must be made sparingly so that potential civil rights plaintiffs are not discouraged from initiating lawsuits of arguable merit; such a chilling effect must be avoided. This action, however, was not even of arguable merit; plaintiffs' evidence clearly demonstrated that they knew their claim of discrimination was clearly without foundation. This action is therefore one in which the drastic sanction of awarding attorney's fees to the prevailing defendant is appropriate.

IT IS SO ORDERED.

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 6, 1985)

No. 83-3466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DR. WILLIAM A. SMITH and MRS. BETTY SMITH,
Plaintiffs-Appellants,

vs.

SMYTHE-CRAMER COMPANY, *et al.*,
Defendants-Appellees.

Before EDWARDS* and JONES, *Circuit Judges*, and PHILLIPS, *Senior Circuit Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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*The Honorable George Edwards took senior status January 15, 1985.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the objejct, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

OHIO REVISED CODE

4735.18 Causes for suspension or revocation of license

The superintendent of real estate may, upon his own motion, investigate the conduct of any licensee. The Ohio real estate commission shall suspend or revoke the license of any licensee who, in his capacity as a real estate broker or salesman, or limited real estate broker or salesman, or in handling his own property, is found guilty of:

* * * * *

(FF) Performing any service for another constituting the practice of law, as determined by any court of law;